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IN THE SUPREME COURT OF THE STATE OF TENNESSEE

DYER EQUITY

No. 1

T. E. BAKER, MRS. T. E. (MINNIE) BAKER, MISS GRACE REYNOLDS, WALKER REYNOLDS, JOHN N. PARKER, MRS. W. D. (FANNIE) SORRELL, W. D. SORRELL, ET AL.,

Defendants, Cross-Complainants, or Appellants,

vs.

N. A. GROSSJEAN, E. J. FROST, ELMER C. SMITH, AND WILLIS K. BLISS, ETC., OR

"DYER COUNTY FOR USE AND BENEFIT OF THE NORTH FORK DRAINAGE DISTRICT OF DYER COUNTY AND, N. A. GROSSJEAN, E. J. FROST, ELMER C. SMITH, AND WILLIS K. BLISS, ETC.," OR,

Cross-Defendants, Complainants, Respondents, or Appellees.

STATEMENTS OF THE POINTS OF FACT AND LAW, ACCOMPANYING PETITION FOR APPEAL.

Now come Cross-Complainants or Appellants and in the above entitled cause and as per Rule 12 (1), of the United States Supreme Court Rules, Appellants submit herewith typewritten statement disclosing the basis upon which Defendants respectfully contend that the Supreme

Court of the United States has jurisdiction and setting out the various points of fact and law embodied in the Cause:

1.

Cross-Complainants or Appellants have presented their petition for appeal to the United States Supreme Court, Washington, D. C., under the Rules of the United States Supreme Court including Rule 9, and under Section 237 (a) of the Judicial Code, Act of February 13, 1925 (Chap. 229, 43 Stat. at L., 936, 937; U. S. C., Title 28, Section 344), from the Judgment, Orders or Decree of the Supreme Court of Tennessee, and which orders or decree upheld the validity of chapter 62 (page 172) of the 1915 Public Acts of Tennessee, passed by the Fifty-ninth General Assembly; said Act or chapter providing that, publication shall have the same force and effect as process and summons issued and personally served on local Landowners and Resident Citizens, and therefore, since there was publication as to the North Fork drainage district of Dyer County, Tennessee, that the county court acquired jurisdiction and legally established and created such North Fork drainage district, by publication; that such act or chapter 62 of the 1915 Public Acts of Tennessee is repugnant to Amendments 5 and 14 of the Constitution of the United States, especially Amendment 14 thereof.

2.

The aforesaid Chapter 62 (pp. 172, 173), of the 1915 Public Acts of Tennessee, passed by the Fifty-Ninth General Assembly, is to-wit, in figures and words as follows:

> "A Bill to be entitled an Act to amend Chapter 185 of the Acts of 1909, and Chapter 25 of the Acts of the first extra session of 1913, said Chapter 185 being entitled 'An Act to provide for the establishment of levee and drainage districts for the purpose of the draining

and reclamation of the wet and swamp lands and lands subject to over-flow in the State and prescribing the method of so doing, and providing for the assessments and collection of the costs and expenses of such improvements and the manner of obtaining the means or funds therefor;'' and said Chapter 25 being an Act to amend said Chapter 185 and to repeal certain parts of said Chapter 185; so as to provide an additional method of proceeding in the establishment of drainage, or drainage and levee districts in bringing parties concerned before the Court for the hearing of the petition; and particularly to amend Section 4 of said Chapter 185 and Section 2 of said Chapter 25.

Section 1. Be it enacted by the General Assembly of the State of Tennessee; That Sec. 4 of Chapter 185 of the Acts of 1909, and Sec. 2 of Chapter 25 of the first extra session of 1913, and both said Acts, be and hereby are amended so as to provide as follows: 'That publication in a newspaper—

'published in the County where the petition is filed and proceeding is pending, for two consecutive weeks, of the time and place set for the hearing of the petition to establish such district

'shall be sufficient notice to the persons concerned

'as owners, lien holders, encumbrances, mortgages, occupants, or in any way, whether residents of the State or non-residents of the State, the last publication to be at least ten (10) days before the date set for such hearing;

'and such notice by publication shall have the same force and effect upon those concerned

'as aforesaid, who are not petitioners, and who are residents of the State,

'as well as non-residents, for all purposes of the proceeding,

'as process would have duly issued from the Court and served personally upon them

'by an officer; and such publication notice need not give the names of the persons thus notified to appear, but need give only a brief statement of the purpose of the hearing, a reference to the petition on file for further information, as to the purpose of the proceeding before what Court the petition is to be heard, and the time and place of the hearing.

'Provided, if the proposed district is to embrace lands in more than one County, if established, such publication shall be made in one newspaper published in each of said Counties.'

"Sec. 2. Be it further enacted; That this Act is not intended to repeal any portion of said Chapter 185 of the Acts of 1909, or any portion of said Chapter 25 of the Acts of the first extra session of 1913, and shall not be so construed; but is intended to furnish an additional method of proceedings seeking to establish drainage, or drainage and levee, districts, and to leave the petitioners therefor to their option whether they will proceed under said Acts which are amended by this Act, or under this Act in giving notice to the parties concerned of such hearing, and in bringing them before the Court.

"Sec. 3. Be it further enacted; That this Act take effect from and after its passage the public welfare requiring it.

"Passed March 30, 1915."

3.

That the Supreme Court of the State of Tennessee denied the *certiorari* and rehearing petitions in this cause, the last opinion being rendered by said Tennessee Supreme Court, on to-wit, April 6, 1940, and Cross-Complainants have respectfully assigned errors in the rendition of the order or the Judgment and decrees rendered by the said Tennessee Supreme Court and including the following, to-wit: The Tennessee Supreme Court in effect affirmed the Judgment

of the Chancery Court, entered to-wit, January 15, 1938, ordering the sale of Cross-Complainants' farm lands, and which Judgment or order is contained in the record or transcript; the Judgment or decrees of the Tennessee Court of Appeals, Western Division at Jackson, Tennessee rendered October 13, 1939; November 10, 1939; and the decrees of the Tennessee Supreme Court, rendered to-wit, May 27, 1939; March 2, 1940, and April 6, 1940, all of which appear in the record or transcript.

4.

It would seem that with the final and favorable Judgment having been granted defendants or Cross-Complainants in the similar or one drainage Cause, Cross-Complainants' plea of abatement on ground of *res adjudicata,* should have been allowed. As seems to be stated by our Courts, "The plea of a former suit pending in the same Court, between the same parties, about the same subject matter, and for the same purposes and *a fortiori* a plea of a former decree in such suit is a good plea to the bill."

5.

Jurisdiction or power to establish the North Fork drainage district could have been acquired by: (1) The filing of petition with one or more Landowners or 20% in 1916 as in the instant case, together with personal summons on the other or 80% of the acreage of Landowners, as provided by Section 4 of Act 185 of the 1909 Public Tennessee Acts and Law, which Act and Section is set out hereinafter. The proof and record positively show there was no personal process or summons issued or served on the Resident Citizens as aforesaid, and, therefore, Appellants or Cross-Complainants contend that no jurisdiction was acquired in such matter and said North Fork Drainage District was

unconstitutional; (2) by the filing of petition with "sixty per-cent" of the acreage or Landowners' names thereon, as required by Act 63 of the 1915 Public Acts of Tennessee together with publication for the balance or minority; the proof and record show that there were 13,792 acres in the said proposed drainage district owned by 143 Landowners, and there were 36 Landowners' names typewritten on the petition, owning 3036 acres (9 or 10 owning no acerage at all), and therefore, no jurisdiction was acquired by such method and the said North Fork Drainage District was thus unconstitutional and void *ab initio.* The necessary paragraphs or Sections 1 and 4 of Act 185 of the 1909 Drainage Acts, passed by the Fifty-Ninth General Assembly of the State of Tennessee are to-wit as follows:

> "Section 1. Be it enacted by the General Assembly of the State of Tennessee, That the county court of any county in this State is hereby vested with the jurisdiction, power, and authority * * * to establish a drainage district * * * as hereby provided.
>
> Section 2. Be it further enacted, That before any County Court shall establish a drainage or levee district, or any levee, ditch, drain, or water-course, improvement, as provided for in this Act, a petition, signed by one or more persons owning land that will be affected by or liable to be assessed for the expenses of the proposed improvement, shall be filed in the office of the County Court Clerk of the county in which improvement is expected to be made, setting forth that any body or district of land in such county, described by metes and bounds or otherwise, so as to convey an intelligible description of such lands, is subject to overflow, or too wet for profitable cultivation, (that) * * * by giving such water course a new outlet, or any or all of these and similar things pertaining to the proposed improvement, and setting forth in said petition as near as may be the starting point, route, and terminus, and lateral branches, if with proper prayer for

purpose desired; and there shall be filed with said petition a bond, with good security, in such penal sum as the County Clerk may deem adequate, to be approved by him, and conditioned for the payment of all preliminary expenses till refunded, and of all costs and expenses incurred in the proceedings in case the County Court does not grant the prayer of the petition, or the petition is dismissed for any cause. The County Court may at any time deemed proper order said bond increased in penalty or in sufficiency, and make all necessary orders to this end."

(Act 63, 1915, Tennessee Public Acts): (That)

"When a petition is filed with all the necessary allegations required by law, and in addition the petition is sworn to, by one or more of the petitioners, and shows that sixty per cent in acres of the land within the bounds of the district sought to be created, is owned by the petitioners; and the petition is accompanied with a general plat, and a general description of the District sought to be created; and a description, by surrounding land owners, is given in the petition, of the respective tracts of land within said bounds and the names of the owners of said tracts, who are not petitioners are set out in said petition; and the petitioners ask that provision be made for funds to defray the preliminary costs and expenses up to the stage in the proceedings where the report of the Commissioners for the assessment of benefits have been filed and confirmed; and the Court deems it expedient that provision should be made for such a fund, to cover the said preliminary costs and expenses; then the Court shall set a day for the hearing upon this matter, and direct that publication for all land owners set out in the petition, who are not petitioners, be made in some newspaper published in the County in which said District is located, and if located in more than one County, then in a newspaper in each County, in which the lands in the said proposed District are located, the publications to be for three consecutive weeks; the last publication to be

at least ten days before the day set for the hearing; and said publication shall notify such land owners of the pending suit, and the prayer for the creation of a fund to pay the preliminary costs and expenses, and the day fixed for the hearing of the same * * *."

(Act 185, 1909 Tennessee Public Acts):

"Sec. 4. Be it further enacted, That upon the filing of the return of the engineer, the County Court shall examine the return; and if the plan seems to be expedient and meets the approval of the court, it shall order the County Clerk to cause notice to be given, as hereinafter provided; but if it does not appear to be expedient, and is not approved, the Court is hereby authorized to direct said engineer, or another engineer selected by it, to prepare another plan. If the court shall deem the proposed improvement inexpedient or inadvisable, after an examination of the return of the engineer, or after a second or further return, it may dismiss the petition and proceedings, and, in that event, it shall adjudge all costs and expenses incurred against the petitioners and the sureties on said bond. When the plan, if any, shall have finally met the approval of the court, it shall order the County Clerk to issue writs to run in the name of the State, commanding the Sheriff to summons the persons named in said writ to appear before the court on the day set by it for the hearing of said petition. Said writ or summons shall name therein to be served the owners of all the tracts or lots of land not petitioners, within the proposed levee, improvement, or drainage district, as shown by the tax books of the county, or by affidavit filed, and upon the persons in actual occupancy of the lands or lots, and also upon any lien holder or incumbrances of any land in the proposed district, as shown by the county records, and shall notify them of the pendency of said petition and the prayer thereof; but no copy of the petition shall accompany the writ.

"Said writ shall be served at least twenty days before the time set for the hearing of the matter of said petition; but said writ shall not be issued for or served

upon any of the persons hereinbefore described who shall file with the Clerk a statement in writing, signed by said party entering his appearance at said hearing and waiving any additional notice, or the service of the writ may be acknowledged. In case any such owner, lien holder, or incumbrancer is a nonresident of the State, or his name or residence can not be ascertained after diligent inquiry, and these facts are made to appear by affidavit filed, then publication shall be made for such party for two consecutive weeks in some newspaper of the county where the proceeding is pending notifying such party or parties of the pendency and prayer of said petition, and to appear for the time set for the hearing thereof, the last publication to be at least twenty days before the time set for such hearing. Proof of such publication may be made as now provided by law in Chancery case, and who are actual owners, or such lien holder or incumbrancer, may be made to appear to the Clerk by the affidavit of any person acquainted with the facts or by the averments of the petition is sworn to.

"If at the time set for the hearing it shall appear to to the court that any person entitled to notice as herein provided has not had such notice, the hearing shall be adjourned till such person can be given the required notice, and the court shall not lose jurisdiction of the subject-matter or of the person already properly notified by such adjournment or postponement. The persons concerned may appear and be heard without formally answering such petition in writing."

6.

Therefore, appellants contend that such act or chapter 62 is a violation of—

Article 1, Sections 8, 6, 21, and 17, of the Constitution of the State of Tennessee, also as follows:

"Sec. 8. That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed, or

"deprived of his life, liberty, or property, but by the judgment of his peers or the law of the land."

"Sec. 6. That the right of trial by jury shall remain inviolate, and no religious or political test shall ever be required as a qualification for jurors."

"Sec. 21. That no man's particular services shall be demanded, or property taken or applied to public use, without the consent of his representatives, or without just compensation being made therefor."

"Sec. 17. That all courts shall be open; and every man, for an injury done him in his lands, goods, person or reputation,

"shall have remedy by due course of law,

"and right and justice administered without sale, denial, or delay."

and Act 37, page 517, of the 1913 Public Acts of Tennessee, passed by the 58th General Assembly of Tennessee referred to herein, is as follows:

"Section 1. Be it enacted by the General Assembly of the State of Tennessee, That Section 39 of Chapter 185 of the Acts of 1909, referred to in the caption of this Act, be, and hereby is, amended by adding the following at the end of the first sentence of said section, which sentence ends with the word "county;" "Provided, the Quarterly County Court shall have the right to contribute, out of the general county fund, such amount as it sees fit to be used in the payment of such preliminary expenses,

"without requiring the same to be paid back or refunded to the county; and where any county has heretofore, by order of the Quarterly County Court, advanced or paid any of said preliminary expenses, said Quarterly County Court may, if it sees fit, by proper order donate the same, or any part thereof, and not require the amount so donated or contributed to be paid back or refunded to the County.

"Sec. 2. Be it further enacted, That this Act take effect from and after its passage, the public welfare requiring it. Passed September 27, 1913."

7.

Would it not also thus appear that the aforesaid 1915 Tennessee chapter 62 is also a violation of—

Amendments 5, 7, and 14, or the "due process," clause of the United States Constitution:

"Amendment 5. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself,

"nor be deprived of life-liberty, or,

"property, without due process of law;

"nor shall private property be taken for public use, without just compensation."

"Amendment 7. In suits at common law, where the value in controversy shall exceed twenty dollars,

"the right of trial by jury shall be preserved,

"and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

"Amendment 14; Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;

"Nor shall any State deprive any person of life, liberty, or,

"property, without due process of law;

"Nor deny to any person within its jurisdiction the equal protection of the laws."

8.

Unquestionably it appears that the 1915 chapter 62, allowing personal process on resident Citizens and local Landowners, by publication, is and was unconstitutional and void, and thus the district in the instant cause was also void for failure to obtain jurisdiction, as Cross-Complainants feel, by the due process clause, Article 1 and Sections 8, 17, and 21 of the Constitution of the State of Tennessee.

9.

Consideration must be shown, and bonds must be produced. Also, non-resident bondholders had no right to sue in name of county or district as was done, (Certificate in Record, p. 277).

10.

Laches or limitations will not apply because the Landowners' Deeds and Titles were registered and dated far beyond and are thus superior to any bonds, especially with the Landowners remaining in ownership and possession, building tenant houses and generally improving and cultivating their lands and farms. In addition, as shown on Page 258 of the Record which we made up, Cross-Defendants stated that the bondholders had ample notice when they obtained the bonds that before such could have been issued, that the law had to be complied with. Such notice appeared on the face of each bond, and thus the bondholders had actual, *caveat emptor, lis pendens,* and constructive notice.

11.

While the presentation of the county court judgment or order may be evidence of its validity, upon the showing of accident, fraud or mistake complete failure of consideration even shocking to the conscience, coupled with the wrongful taking of the right of way lands, the "rule is relaxed" and it would appear that the whole case is opened up at this time and the Testimony or proof of the Cross-Complainants as to the damages and redress is highly competent as to payment, credit or set off, under Act 37 of the 1913 Public Acts of Tennessee, for payment of the illegal assessments under duress, protest or compulsion and without knowing that the said drainage district as proposed was void, and also for the same reasons Cross-Complainants respectfully feel that they were entitled to payment for the wrongful taking of their right of way lands.

12.

There seems to be a definite distinction between the powers of a Municipal Corporation, like Dyersburg, Covington, Nashville, Jackson, Knoxville, Memphis, Chattanooga, which are incorporated by Special Act of the Legislature and may publish for abutting property owners, if such Municipality wishes to extend or pave a street, and that of a defunct drainage district which is neither a corporation *de facto* or *de jure*.

13.

Actual or constructive fraud in signing the names to the Petition without proper authority or power of attorney and by the typewriter, it being shown that the names of some of the Landowners were not even on any pencilled memorandum or authority and yet their names were also

typewritten on the petition, and all this appears to be sufficient to render the Judgment on the assessments, void.

14.

The right of way lands were wrongfully taken in violation of the Constitution, in excavating and dynamiting the 40-yard canal, 12½ miles across the farms and lands, and not one penny in compensation was paid to the Landowners, and even those right of way lands taken, were assessed with drainage assessments; all of which was in violation of the law;

all of which Cross-Complainants or Appellants contend were in violation of Amendments 5, 7, and 14, of the Constitution of the United States.

And, these matters we respectfully submit,

HORACE C. YOUNG,
MILTON WILLIAMS,
Solicitors for Cross-Complainants or Defendants or Appellants.